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NOTPETYA, NOT WARFARE: RETHINKING THE INSURANCE WAR EXCLUSION IN THE CONTEXT OF INTERNATIONAL CYBERATTACKS

Katherine S. Wan*

Abstract: When an insurer wants to avoid coverage of a specific type of loss, it must explicitly exclude the loss in its policy. The *war exclusion* is a typical exclusion found in insurance policies that excuses insurers from covering losses caused by war or warlike actions. Courts interpreting the exclusion have traditionally held that *war* must consist of hostilities between sovereign nations. Despite the rise of state-sponsored cyberattacks, the United States has been hesitant to officially declare war in response. Even still, insurers argue that their war exclusions should apply to these new cyber losses. Courts are now tasked with reanalyzing the war exclusion in the context of the rise of cyberwarfare. This Comment examines the history of the war exclusion, the policy reasons behind burden allocation, and where cyberattacks fall on the spectrum between war and terrorism. Insurers should not be able to use the war exclusion to escape liability for state-sponsored cyberattacks.

INTRODUCTION

On June 27, 2017, Mondelēz International, one of the world's largest snack companies, had its multinational business interrupted by the NotPetya cyberattacks.¹ These attacks resulted in stolen user credentials and the physical loss of thousands of computers and servers.² Mondelēz estimated that it lost over \$100 million from hardware and business interruption as a result of the cyberattacks.³ Mondelēz was one of many corporations to suffer losses from this global incident.⁴

Almost eight months after the attack, the United States government announced its conclusion that the Russian military was responsible for the NotPetya attacks.⁵ Mondelēz submitted a claim under its commercial

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1. Adam Satariano & Nicole Perlroth, *Big Companies Thought Insurance Covered a Cyberattack. They May Be Wrong*, N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/04/15/technology/cyberinsurance-notpetya-attack.html> [<https://perma.cc/2CBH-P2ND>].

2. Complaint at 2–3, *Mondelēz Int'l, Inc. v. Zurich Am. Ins. Co.*, No. 2018L011008 (Ill. Cir. Ct. Oct. 10, 2018), 2018 WL 4941760.

3. *Id.* at 3.

4. See Satariano & Perlroth, *supra* note 1.

5. Press Briefing, The White House, Statement from the Press Sec'y (Feb. 15, 2018) [hereinafter

property insurance policy, which covered physical loss or damage to electronic data.⁶ Mondelēz's insurer, Zurich, denied the claim under the policy's war or warlike acts exclusion.⁷ On October 10, 2018, Mondelēz filed a lawsuit against Zurich in the Circuit Court of Cook County, Illinois.⁸ The case is currently pending.⁹

The policy at issue in the Mondelēz lawsuit is an *all risk* property insurance policy.¹⁰ An all risk property insurance policy provides first party coverage for losses to the insured's property caused by "all perils not specifically excluded" by the policy language.¹¹ In general, an insurer may include exclusions or limitations in its policy with the insured as part of its freedom to contract.¹² However, under the doctrine of *contra proferentem*, the terms of an exclusion are generally construed strictly against the insurer.¹³ This doctrine resolves all ambiguities in favor of the insured because of the presumed imbalance of bargaining power between the parties.¹⁴ If the risk is deemed to be generally included within the terms of the policy, courts will find coverage unless the insurer can show that the parties clearly intended to exclude the loss.¹⁵

The war and warlike actions exclusion at issue in Mondelēz's suit against Zurich is a common exclusion in property policies, which typically states that the insurer is not liable for losses caused by war or

Statement from the Press Secretary], <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-25/> [https://perma.cc/7YM2-G4S2].

6. See Complaint, *supra* note 2, at 3.

7. See *id.* at 4.

8. See *id.* at 1.

9. See Docket, *Mondelēz Int'l, Inc. v. Zurich Am. Ins. Co.*, No. 2018-L-011008 (Ill. Cir. Ct. Oct. 10, 2018).

10. Complaint, *supra* note 2, at 1.

11. STEVEN PLITT ET AL., 10A COUCH ON INS. § 148:4 (3d ed. 2019). The other type of insurance that is commonly issued is liability insurance. See Elisa Alcabes et al., *A Concise Guide to Insurance Litigation in USA*, LEXOLOGY (Dec. 18, 2019), [https://www.lexology.com/library/detail.aspx](https://www.lexology.com/library/detail.aspx?l=https://perma.cc/WD3A-ULHH) [https://perma.cc/WD3A-ULHH]. In the commercial context, the standard liability insurance would be a commercial general liability policy. *Id.* Liability policies protect the insured from liability when third parties are injured and sue the insured. *Id.* This Comment is not concerned with liability policies and will focus on the interpretation of all risk property insurance policies.

12. See STEVEN PLITT ET AL., 2 COUCH ON INS. § 22:31 (3d ed. 2019).

13. See *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143, 1151 (9th Cir. 2019) ("Under the doctrine of *contra proferentem*, any ambiguity in an exclusion is generally construed against the insurer and in favor of the insured.").

14. See *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974) ("[I]t is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion.").

15. STEVEN PLITT ET AL., *supra* note 12, § 22:31.

warlike actions.¹⁶ This exclusion is not difficult to apply during times of declared war.¹⁷ However, the application becomes more complicated when countries, such as the United States, blame foreign nations for attacks but do not formally declare war.¹⁸ For example, the United States government blamed North Korea for hacking Sony in 2014 and causing an estimated \$100 million in damage, but labeled the attack “cyber-vandalism,” not war.¹⁹

Additionally, the rise of terrorism in the twentieth century has made it more difficult to differentiate acts of war from acts of terrorism.²⁰ War must consist of hostilities between sovereign nations.²¹ Under the Hague Convention, a soldier must be under the command of a responsible party, carry arms openly, wear distinctive insignia, and operate lawfully in accordance with the laws and customs of war to be considered an operative of war.²² In contrast, *Black’s Law Dictionary* defines terrorism as “[t]he use or threat of violence to intimidate or cause panic, esp[ecially] as a means of achieving a political end.”²³ The entry notes various types of terrorism—some committed by state-actors, some committed by unaffiliated individuals, and some committed by political organizations unattached to any specific country.²⁴ While courts have applied the *war exclusion* to losses caused by the September 11, 2001 terrorist attacks (hereinafter 9/11 attacks), they have refused to expand the coverage to

16. STEVEN PLITT ET AL., *supra* note 11, § 152:1 (“Most property insurance policies provide coverage on an all-risk basis. However, all-risk policies do not cover all losses, but contain at least four exclusions that may be relevant to war or war-related losses. The first exclusion, the war exclusion, focuses on the nature of the act and the actors.”); *see also Pan Am. World Airways*, 505 F.2d at 994 (excerpting the exclusion language from Pan Am’s policy with Aetna).

17. *See Vanderbilt v. Travelers’ Ins. Co.*, 184 N.Y.S. 54, 56 (Sup. Ct. 1920), *aff’d*, 194 N.Y.S. 986 (App. Div. 1922), *aff’d*, 235 N.Y. 514 (1923); *Int’l Dairy Eng’g Co. of Asia, Inc. v. Am. Home Assurance Co.*, 352 F. Supp. 827 (N.D. Cal. 1970), *aff’d*, 474 F.2d 1242 (9th Cir. 1973).

18. *See* Statement from the Press Secretary, *supra* note 5 (blaming Russia for NotPetya attacks but not declaring war).

19. *See* Matthew Foy & Jonathan Schwartz, *Sony’s Interview Quagmire: A Watershed Moment for Cyberinsurance*, IN-HOUSE DEF. Q., Spring 2015, at 73, 77.

20. *See In re Sept. 11 Litig.*, 931 F. Supp. 2d 496, 508 (S.D.N.Y. 2013), *aff’d*, 751 F.3d 86 (2d Cir. 2014).

21. *See Pan Am. World Airways*, 505 F.2d at 990.

22. *See* Hague Convention (II) on the Laws and Customs of War on Land, Annex to the Convention, July 29, 1899, § 1, ch. 1, art. 1 [hereinafter Hague Convention]. The Hague Convention governs and defines laws of war and war crimes in international law. *See Hague Convention*, ENCYC. BRITANNICA (June 8, 2020), <https://www.britannica.com/event/Hague-Conventions> [<https://perma.cc/WJ2L-FLEF>].

23. *Terrorism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

24. *Id.*

other acts of terror.²⁵

Terrorist activities have evolved alongside modern warfare, incorporating and utilizing new technologies such as the internet and leading to the rise of cyberattacks.²⁶ A cyberattack is defined by the *Merriam-Webster Dictionary* as “an attempt to gain illegal access to a computer or computer system for the purpose of causing damage or harm.”²⁷ In 2017, former Deputy Attorney General Rod Rosenstein estimated that “the monetary costs of global annual cybercrime will double from \$3 trillion in 2015 to \$6 trillion in 2021.”²⁸ FBI Director Christopher Wray warned Congress that “the frequency and impact of cyber-attacks on our Nation’s private sector and Government networks have increased dramatically in the past decade and are expected to continue to grow.”²⁹ With the increase in cyberattacks, corporate victims have tried to recoup their losses through their insurers.³⁰ Courts have generally struggled to interpret archaic policies in light of the modern tools of attack, in part because cyberattacks can be perpetrated by a variety of parties.³¹

This Comment explores the application of the war exclusion clause in all risk property insurance policies to deny liability for losses caused by foreign cyberattacks. Part I discusses the traditional use of the war exclusion clause in all risk property policies, beginning with the common

25. *Compare In re Sept. 11 Litig.*, 931 F. Supp. 2d at 514 (applying war exclusion to insurance claim arising from 9/11 attacks), with *Pan Am. World Airways, Inc.*, 505 F.2d at 1015 (declining to apply war exclusion for loss caused by Popular Front for the Liberation of Palestine (PFLP) airplane hijacking).

26. See generally Rod Rosenstein, Deputy Att’y Gen., Remarks at the 2017 North American International Cyber Summit (Oct. 30, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-2017-north-american-international> [<https://perma.cc/PV78-2LMU>]; *World-Wide Threats: Keeping America Secure in the New Age of Terror: Hearing Before the H. Comm. on Homeland Sec.*, 115th Cong. 29 (2017) [hereinafter *World-Wide Threats*] (statement of Christopher Wray, Dir., Fed. Bureau of Investigation).

27. *Cyberattack*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cyberattack> [<https://perma.cc/Z8PT-45S2>].

28. Rosenstein, *supra* note 26.

29. *World-Wide Threats*, *supra* note 26 (statement of Christopher Wray, Dir., Fed. Bureau of Investigation).

30. See generally Thomas D. Hunt, “*The Internet of Buildings*”: *Insurance of Cyber Risks for Commercial Real Estate*, 71 OKLA. L. REV. 397, 405 (2019) (noting that insurers collected \$3.25 billion in cyber insurance premiums from businesses in 2016 and expect to quadruple revenue by 2025).

31. See Foy & Schwartz, *supra* note 19; Rosenstein, *supra* note 26. (“Today, the attacks are concerted efforts by sophisticated individuals, criminal enterprises, or nation-states that can target a range of home users, businesses, networks, or critical infrastructure with laser-like precision to cause widespread damage.”).

law application in the United Kingdom through the Second Circuit's decisions in the 1980s.³² Part II analyzes the Ninth Circuit's application of the war exclusion in 2019 and its invocation of the political question doctrine.³³ Part II then discusses the history of the political question doctrine and the courts' past practice of keeping the determination of war a judicial question.³⁴ Part III explores the history of cyberattacks and highlights two recent ransomware attacks that have affected global politics and insurance litigation—the WannaCry and NotPetya cyberattacks. Part IV examines terrorism and cyber insurance policies and explains why they are not used by corporate insureds to recover from state-sponsored cyberattacks. Finally, Part V asserts that insurers should not be able to escape liability for cyberattacks using the traditional war exclusion. For the purposes of applying the war exclusion, determining sovereignty should be a judicial question rather than a political question. Further, under the circumstances such as the NotPetya attacks, courts should not permit insurers to use the war exclusion to escape their contractual obligations to cover losses.

I. THE TRADITIONAL USE OF THE WAR EXCLUSION
CLAUSE IN ALL RISK PROPERTY POLICIES ENCOURAGES
A NARROW APPLICATION

The war exclusion is a common exclusion found in commercial all risk property insurance policies.³⁵ While the exclusion is relatively easy to apply in periods of declared war, it becomes more problematic when the combatants do not clearly belong to a sovereign nation. Part I begins by illustrating the industry rationale for writing the war exclusion and the traditional application of the exclusion in the late nineteenth century. The second section of Part I analyzes *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*³⁶ and the case's more contemporary application of the war exclusion in the face of the rise of terrorism in the 1970s. Finally, the last section of Part I discusses the development of the idea of sovereignty and its relationship with terrorism and civil unrest

32. See *Britain S.S. Co. v. The King* [1919] 1 K.B. 575; *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1464 (S.D.N.Y. 1983).

33. See *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143 (9th Cir. 2019).

34. See *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974); *Holiday Inns*, 571 F. Supp. 1460.

35. See STEVEN PLITT ET AL., *supra* note 11, § 152:1.

36. 505 F.2d 989 (2d Cir. 1974).

through the *Holiday Inns, Inc. v. Aetna Insurance Co.*³⁷ case.

A. *The Application of the War Exclusion and Traditional Warfare*

Insurance companies developed the war exclusion to eliminate the insurer's liability for losses that occurred during war because "it [was] impossible to evaluate the potential insured risks."³⁸ In the insurance industry, "war" has a very specific meaning.³⁹ Both "English and American cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character."⁴⁰ In other words, "war" in the insurance context is limited to hostilities between de jure or de facto sovereign entities.⁴¹ Because of the unpredictable and potentially catastrophic nature of war, the insurance industry decided that it was better to exclude war losses instead of attempting to calculate premiums to accommodate such losses.⁴² The risk of war losses was instead shifted to the governments waging them.⁴³

Courts have contemplated the impact of war on insurance recovery since at least the American Civil War.⁴⁴ For example, in the 1871 case *Welts v. Connecticut Mutual Life Insurance Co.*,⁴⁵ the New York Court of Appeals held that the death of a civilian railroad worker near a Confederate military encampment did not fall under the defendant's war exclusion clause.⁴⁶ As the twentieth century saw two world wars, the number of insurance claims subject to the war exclusion significantly increased.⁴⁷ These cases focused on physical losses that occurred during

37. 571 F. Supp. 1460 (S.D.N.Y. 1983).

38. STEVEN PLITT ET AL., *supra* note 11, § 152:1.

39. See *Holiday Inns*, 571 F. Supp. at 1464–65.

40. *Pan Am. World Airways*, 505 F.2d at 1012.

41. See *id.* at 1005 ("[F]or there to be a 'war' a sovereign or quasi-sovereign must engage in hostilities."); see also *The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1863) ("A war may exist where one of the belligerents, claims sovereign rights as against the other.").

42. See STEVEN PLITT ET AL., *supra* note 11, § 152:1.

43. See *Pan Am. World Airways*, 505 F.2d at 994. In this specific case, "Pan American had to turn to the United States government for war risk coverage for the excess over the London Market [insurer] limit." *Id.*

44. See *Welts v. Conn. Mut. Life Ins. Co.*, 48 N.Y. 34 (1871).

45. 48 N.Y. 34 (1871).

46. *Id.* at 39–40.

47. See, e.g., *Britain S.S. Co. v. The King* [1919] 1 K.B. 575 (holding war exclusion did not apply to a boat that ran aground due to war-mandated altered course); *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 282 F. 976 (2d Cir. 1922) (holding that a ship's head-on collision with another ship due

periods of declared war between sovereign nations. For example, in *Vanderbilt v. Travelers Insurance Co.*,⁴⁸ the war exclusion applied because “the *Lusitania* was sunk in accordance with the instructions of a sovereign government, Germany, by naval forces of that government, during a period when a war was in progress between Great Britain and Germany.”⁴⁹ Grounding decisions on the overt acts of sovereigns made the application of the war exclusion relatively straightforward.

B. Pan American World Airways, Inc. v. Aetna Casualty & Surety Co. and the Modern Interpretation of the War and Warlike Operations Exclusions

Although the United States has not officially declared war since World War II,⁵⁰ insurers have continued to use the war exclusion in an attempt to escape liability for certain losses. Modern decisions on the application of the war exclusion most often cite to *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co. (Pan Am)*.⁵¹ The case involved a Pan American World Airways (Pan Am) flight that was hijacked by two members of the Popular Front for the Liberation of Palestine (PFLP).⁵² The hijackers seized control of the plane over London, forced the crew to fly to Beirut and Cairo, evacuated all of the passengers, and then destroyed the plane.⁵³ Pan Am submitted a claim to Aetna to recover the loss from the aircraft’s destruction, but Aetna denied the claim, citing the war exclusion in Pan Am’s all risk property policy.⁵⁴ Specifically, Aetna relied on a *usurped powers* exclusion and an industry-standard war exclusion:

C. This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:

to poor visibility as a result of a British order to sail without lights did not trigger the war exclusion); *Vanderbilt v. Travelers’ Ins. Co.*, 184 N.Y.S. 54, 56 (Sup. Ct. 1920), *aff’d*, 194 N.Y.S. 986 (App. Div. 1922), *aff’d*, 235 N.Y. 514 (1923) (holding that death in sinking of the *Lusitania* was excluded under war exclusion); *Standard Oil Co. v. United States*, 340 U.S. 54 (1950) (holding a ship’s collision with a minesweeper in 1942 did not qualify under the war exclusion).

48. 184 N.Y.S. 54 (Sup. Ct. 1920), *aff’d*, 194 N.Y.S. 986 (App. Div. 1922), *aff’d*, 235 N.Y. 514 (1923).

49. *Id.* at 56.

50. U.S. SENATE, OFFICIAL DECLARATIONS OF WAR BY CONGRESS, https://www.senate.gov/pagelayout/history/h_multi_sections_and_tasers/WarDeclarationsbyCongress.htm [<https://perma.cc/S842-AHWR>].

51. *See Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983); *In re Sept. 11 Litig.*, 931 F. Supp. 2d 496 (S.D.N.Y. 2013), *aff’d*, 751 F.3d 86 (2d Cir. 2014); *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143 (9th Cir. 2019).

52. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 993 (2d Cir. 1974).

53. *See id.*

54. *See id.* at 994–96.

1. capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof *by any Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power*, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful (this subdivision 1. shall not apply, however, to any such action by a foreign government or foreign governmental authority follow-the forceful diversion to a foreign country by any person not in lawful possession or custody of such insured aircraft and who is not an agent or representative, secret or otherwise, of any foreign government or governmental authority) [hereinafter “clause 1”];

2. *war, invasion, civil war, revolution, rebellion, insurrection or warlike operations*, whether there be a declaration of war or not [hereinafter “clause 2”];⁵⁵

Using this language, Aetna tried to escape liability and argued that Pan Am’s war insurers should cover the loss instead.⁵⁶ If the attack was considered a warlike action, Pan Am would have sought coverage from the United States government because “American underwriters do not write war risk coverage.”⁵⁷ When interpreting the Aetna policy language, the court relied on the doctrine of *contra proferentem*.⁵⁸ *Contra proferentem* provides that when there is ambiguity in an exclusionary term found in a policy of insurance, the term should be resolved in the favor of the insured because of the insurer’s enhanced bargaining power.⁵⁹ Because Aetna was aware of the threat of political plane hijackings at the time the policy was purchased, the Second Circuit reasoned that Aetna should have decided to use more precise exclusionary language in section C.1 of the policy to clarify the ambiguity in coverage.⁶⁰

The court then discussed what qualified as “war” under the policy, determining that “war is a course of hostility engaged in by entities that

55. *Id.* at 994 (emphasis added).

56. *See id.* Pan Am had separate insurance coverage through Lloyd’s underwriters that specifically covered the war risks that Aetna’s policy excluded. *See id.* At the time, the London insurance market was the only insurance market in which aviators could obtain war risk coverage. *See id.* Pan Am then obtained excess war risk coverage through the United States government through the Federal Aviation Act of 1958. *See id.*; *see also* Federal Aviation Act of 1958, 49 U.S.C. §§ 1531–42 (1970).

57. *Pan Am. World Airways*, 505 F.2d at 994.

58. *Id.* at 999–1000.

59. *See id.*

60. *See id.* at 1000–01.

have at least significant attributes of sovereignty.”⁶¹ Aetna attempted to argue that a state of guerilla warfare existed between the United States and the PFLP.⁶² However, the court rejected the notion that the PFLP was a sovereign entity: “[t]he hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government.”⁶³

The court also rejected the notion that the damage caused by the PFLP agents was a “warlike operation.”⁶⁴ The Second Circuit agreed with the district court’s holding that “[t]here is no warrant in the general understanding of English, in history, or in precedent for reading the phrase ‘warlike operations’ to encompass the infliction of intentional violence” by political, non-governmental groups upon citizens of non-belligerent powers.⁶⁵ The district court relied on a series of older British cases to demonstrate that warlike operations have never been understood to include violence by non-governmental entities in the common law tradition.⁶⁶ For example, in *Henry & MacGregor (Ltd.) v. Marten*,⁶⁷ the King’s Bench held that the damage caused to a ship that rammed a submerged object upon the mistaken belief that it was a German submarine was a result of a warlike operation because the ship’s captain attempted to act against the country’s declared enemies.⁶⁸ The Second Circuit also relied on the more recent case *International Dairy Engineering Co. v. American Home Assurance Co.*⁶⁹ The *International Dairy* Court found that the destruction of plaintiff’s box materials in South Vietnam by American aerial parachute flares was the result of warlike operations because “[t]he loss was at the site of hostilities, it was caused by a warlike agency, and the lost property was the property of a belligerent national.”⁷⁰ Based on this interpretation, the *Pan Am* court found that “there [was] no basis whatsoever” for denying coverage under the warlike

61. *Id.* at 1012.

62. *See id.* at 996.

63. *Id.* at 1015.

64. *Id.*

65. *Id.* at 1015–16 (noting that “[t]he district court’s holding is . . . supported by the weight of authority” (citing *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1130 (S.D.N.Y. 1973))).

66. *See id.* at 1016; *Atl. Mut. Ins. Co. v. King* [1918] 1 K.B. 307; *Henry & MacGregor (Ltd.) v. Marten* [1918] 34 TLR 504, 505 (KB).

67. [1918] 34 TLR 504 (KB).

68. *Id.* at 505.

69. 352 F. Supp. 827, 828 (N.D. Cal. 1970), *aff’d*, 474 F.2d 1242 (9th Cir. 1973).

70. *Pan Am. World Airways, Inc.*, 505 F.2d at 1017.

operation exclusion because the Pan Am airplane did not carry military cargo, was not destined for a theater of war, was not owned by a belligerent of war, and did not plan to fly over any theater of war.⁷¹

C. *The Impact of Pan Am and Subsequent Applications of the War Exclusion*

Subsequent to *Pan Am*, the Southern District of New York further analyzed what constitutes a sovereign in the context of the war exclusion when a hotel was damaged in Beirut, Lebanon.⁷² When Holiday Inn made a claim under its all risk property insurance policy for physical damage to the hotel resulting from skirmishes between religious groups in the city, Aetna denied liability.⁷³ Aetna specifically cited the war exclusion in the policy, which excluded losses caused as a result of “[w]ar, invasion, acts of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, insurrection, revolution, conspiracy, military or usurped power.”⁷⁴ The court noted that while the press and politicians were calling the situation in Lebanon a civil war, the meaning of “war” when used in insurance policies was “quite different from those of politics or journalism.”⁷⁵

Instead, relying heavily on *Pan Am* and concluding that “war” required conflict between two sovereigns, the court focused on determining whether the religious factions skirmishing in Beirut qualified as “sovereigns” or “quasi-sovereigns.”⁷⁶ In order for a group to qualify as a sovereign or quasi-sovereign, it must “manifest attributes of sovereignty,” which include staking out and maintaining adverse claims to territory and making declarations of independence and sovereignty.⁷⁷ However, if the group is occupying territory within a sovereign state “upon the consent of that state’s de jure government,” then that group cannot sufficiently show sovereignty.⁷⁸ The court found that the religious groups at issue were not sovereigns because they occupied land with the consent of the de jure

71. *Id.*

72. *See* *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983).

73. *See id.* at 1463.

74. *Id.*

75. *Id.* at 1464; *see also* *Spinney’s (1948) Ltd. v. Royal Ins. Co.*, [1980] 1 Lloyd’s Rep. 406 (QBD). In that case, the British court held that the United Kingdom government’s labelling of the unrest in Lebanon as a civil war—the same unrest that caused the damage to the hotel in the *Holiday Inn* case—was irrelevant to the interpretation of war in the insurance context. *Id.*

76. *See Holiday Inns*, 571 F. Supp. at 1500.

77. *Id.* (emphasis omitted).

78. *Id.* (emphasis omitted).

government—as understood in the insurance context.⁷⁹ Although Syria participated in the conflict, the court viewed this as a sovereign fighting non-sovereign groups.⁸⁰ In order for the war exclusion to apply, the insurer needed to show that the loss was caused by fighting between two sovereigns.⁸¹

II. *UNIVERSAL CABLE PRODUCTIONS* AND DETERMINING WHETHER WAR EXISTS IS A POLITICAL OR JUDICIAL QUESTION

Until the Ninth Circuit’s decision in *Universal Cable Productions, LLC v. Atlantic Specialty Insurance Co.*,⁸² the political question doctrine did not play an impactful role in war exclusion litigation. By invoking the political question doctrine, the Ninth Circuit revived a tool insurers could use to prevent war exclusion cases from being litigated.⁸³ The Second Circuit had decided cases such as *Pan Am* with barely a cursory discussion of the political question doctrine, instead focusing on rigorous case analysis.⁸⁴ This Part first analyzes the Ninth Circuit’s application of the political question doctrine in *Universal Cable* and its interpretation of the war exclusion. The second section of Part II briefly summarizes the history of the political question doctrine and its relationship with judicial interpretations of war in the United States.

A. *The Ninth Circuit’s Reinvocation of the Political Question Doctrine in Universal Cable*

In *Universal Cable*, the plaintiff sent a film crew to shoot a television series in Jerusalem.⁸⁵ Hamas shot rockets from Gaza into Israel, forcing the crew to stop filming and relocate.⁸⁶ Universal tried to claim the cost of moving the film crew, but Atlantic Specialty denied the claim under the war exclusion.⁸⁷ The Atlantic Specialty policy excluded losses caused by: “(1) *War*, including undeclared or civil war; or (2) *Warlike action* by

79. *See id.* at 1501.

80. *See id.*

81. *See id.*

82. 929 F.3d 1143 (9th Cir. 2019).

83. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) (holding that claim bringing political question is nonjusticiable if the claim cannot be judicially defined or remedied).

84. *See supra* sections I.B, I.C.

85. *Universal Cable Prods.*, 929 F.3d at 1149.

86. *See id.* at 1150.

87. *See id.*

a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign, or other authority using military personnel or other agents”⁸⁸ The court held that “[b]oth ‘war’ and ‘warlike action by a military force’ have a specialized meaning in the insurance context”⁸⁹ and that “war refers to and includes *only* hostilities carried on by entities that constitute governments at least de facto in character.”⁹⁰ In contrast to *Pan Am*, the *Universal Cable* Court declined to apply the *contra proferentem* doctrine because the parties at issue were both sophisticated with relatively equal bargaining power.⁹¹

Despite refusing to invoke *contra proferentem*, the court still did not apply the war exclusion to the loss at issue.⁹² Unlike *Holiday Inns*, the court here determined the sovereignty of Hamas not in an insurance context but based upon the political stance of the United States.⁹³ The court relied on *Oetjen v. Central Leather Co.*,⁹⁴ which held that “[w]ho is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges”⁹⁵ Because “[t]he United States has never recognized Palestine or Gaza as sovereign territorial nations, nor has it ever recognized Hamas as a sovereign or quasi-sovereign,” the court concluded that Hamas was not an entity that could trigger the war exclusion.⁹⁶ The court reasoned that because “the Palestinian Authority is the de jure government, and Hamas has recognized the Palestinian Authority as the controlling government of Palestine,” Hamas could not be a sovereign.⁹⁷ Although the Ninth Circuit declined to apply the war exclusion in this case, the court’s decision to resurrect the political question doctrine in its analysis has muddled future insurance litigation.

88. *Id.* at 1149.

89. *Id.* at 1147.

90. *Id.* at 1154.

91. *See id.* at 1151.

92. *See id.* at 1159–60.

93. *See id.* at 1148.

94. 246 U.S. 297, 302 (1918); *see also* *Mingtai Fire & Marine Ins. Co. v. UPS*, 177 F.3d 1142, 1145 (9th Cir. 1999) (holding that even in the insurance context, sovereignty is a political, not a judicial question).

95. *Oetjen*, 246 U.S. at 302.

96. *Universal Cable Prods.*, 929 F.3d at 1148.

97. *Id.* at 1158.

B. *A Brief History of the Political Question Doctrine and Its Relationship with War*

Politically-charged facts are not the same as nonjusticiable political questions.⁹⁸ Courts use the political question doctrine to decline jurisdiction over an issue that has been delegated to another branch of government by the Constitution.⁹⁹ The doctrine had not been invoked in war exclusion insurance litigation until *Universal Cable*, with courts preferring to analyze the specific facts of the case instead of only governmental decisions.¹⁰⁰ The political question doctrine was first announced in the seminal case *Marbury v. Madison*,¹⁰¹ which determined that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹⁰² The Supreme Court clarified when an issue is nonjusticiable under the political question doctrine in *Baker v. Carr*,¹⁰³ listing six factors for courts to consider when deciding to apply the political question doctrine.¹⁰⁴ Interestingly, “[t]he Court’s most comprehensive effort to define the parameters of political question doctrine came in [*Baker*,] a case far removed from matters of war or its duration, and in which the Court concluded that the dispute before it did *not* present a political question.”¹⁰⁵

Historically, courts have declined to invoke the political question doctrine to determine the existence of war.¹⁰⁶ Before *Marbury* was decided, the Court already demonstrated its willingness to determine the

98. See Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 164 (2014).

99. See *Baker v. Carr*, 369 U.S. 186, 210 (1962).

100. See *supra* section II.A.

101. 5 U.S. 137 (1803).

102. *Id.* at 170.

103. 369 U.S. 186.

104. *Id.* at 217 (“Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

105. Pearlstein, *supra* note 98, at 169.

106. *Id.* at 157 (“Indeed, a number of contemporaneous statutes required similar inquiries into the beginning and/or ending date of the war, and while the Court sometimes addressed the matter with little or no analysis, in no case did it appear to contemplate declining jurisdiction over the issue as the political question doctrine would require.”).

existence of war for the purpose of statutory interpretation.¹⁰⁷ In *Bas v. Tingy*,¹⁰⁸ the Court was asked to consider a dispute arising under a 1799 federal statute, which provided for certain rights to salvage for American ships that were retaken from an enemy.¹⁰⁹ The question for the Court was whether the statute applied when a French merchant ship engaged with an American ship during a period in which war was not yet declared.¹¹⁰ The Court did not hesitate to exercise its jurisdiction, reasoning that

[i]n fact and in law we are at war: an *American* vessel fighting with a *French* vessel, to subdue and make her prize, is fighting with an enemy accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law.¹¹¹

“[E]ven in the absence of a declaration of war by Congress, the Court would interpret the law based on the world as the justices themselves perceived it,” and did not delegate this determination to the executive branch.¹¹²

Even with the formal creation of the political question doctrine in *Marbury*, courts continued to decide whether war existed for the purposes of statutory interpretation. For example, in *Ludecke v. Watkins*¹¹³ the Court interpreted the Alien Enemy Act¹¹⁴ under the authority that “when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.”¹¹⁵ The Court did not contradict its holding in *Baker* because “there is a difference between the position . . . that the end of war depends, for purposes of the statute, on some kind of political *act*, and the view, which [the Court] avoids, that war’s existence *vel non* is a non-justiciable political *question*.”¹¹⁶ Later, the Court emphasized that “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”¹¹⁷

107. See *Bas v. Tingy*, 4 U.S. 37 (1800).

108. 4 U.S. 37 (1800).

109. *Id.* at 37.

110. *Id.* at 42.

111. *Id.*

112. Pearlstein, *supra* note 98, at 151.

113. 335 U.S. 160 (1948).

114. 50 U.S.C. § 21.

115. *Ludecke*, 335 U.S. at 169 n.13.

116. Pearlstein, *supra* note 98, at 164 (emphasis in original).

117. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

Like statutory claims, common law claims that involve politically-charged facts are not the same as nonjusticiable political questions.¹¹⁸ In *Alperin v. Vatican Bank*,¹¹⁹ a group of Holocaust survivors and their descendants sued banks and political groups that profited from Nazi activities during World War II.¹²⁰ The plaintiffs brought claims of conversion, unjust enrichment, and restitution (the Property Claims).¹²¹ The court held that the Property Claims were justiciable.¹²² “Simply because a foreign bank is involved and the case arises out of a ‘politically charged’ context does not transform the Property Claims into political questions.”¹²³ While war is a politically-charged topic, it is not completely nonjusticiable under the political question doctrine.¹²⁴ “Once a political judgment is made to stop shooting, it must be within the power of the courts to determine under the objective standard given by law—whatever the government subsequently *says*—that hostilities have come to an end.”¹²⁵ Cases that involve facts shaped by a political decision such as ending war are still justiciable if the issues can be measured by a legal standard.

III. THE RISE OF STATE-SPONSORED CYBERATTACKS HAS MUDDLED THE LINE SEPARATING THE WAR EXCLUSION FROM THE POLITICAL QUESTION DOCTRINE

The inclusion of the political question doctrine in war exclusion insurance litigation has complicated the already complex factfinding that has evolved with the rise of state-sponsored cyberattacks.¹²⁶ Cyberattacks do not involve the traditional markers of warfare courts have used to determine the applicability of the war exclusion in the past.¹²⁷

118. See *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

119. 410 F.3d 532 (9th Cir. 2005).

120. *Id.* at 533.

121. *Id.* at 548.

122. *Id.*

123. *Id.* The plaintiffs also claimed that the defendants used slave labor during the war (the “War Objectives Claims”). *Id.* However, the court held that the War Objectives Claims were nonjusticiable under the political question doctrine because it did not want to speak for the U.S. government to condemn the actions of a foreign government. *Id.* at 561–62. By deciding to adjudicate the common law property claims and dismissing the war crimes claims, the *Alperin* Court preserved the separation of powers between the court and the executive branch as it avoided addressing matters of foreign relations and stuck to interpreting the law. *Id.* at 539.

124. See Pearlstein, *supra* note 98, at 167.

125. *Id.* at 218–19 (emphasis in original).

126. See *infra* Part V.

127. See *supra* Part I.

Governments have also been quick to blame others for cyberattacks using direct language that can lead the general public to believe the attacks to be acts of war.¹²⁸ Part III first discusses cyberattacks generally and uses the WannaCry attacks as an example of recent ransomware cyber risks. The second section of Part III examines the NotPetya cyberattacks, specifically the lawsuit filed by Mondelēz International as a result of its losses suffered from the attacks and the United States' response.

A. History of Cyberattacks and the Impact of the WannaCry Cyberattacks

The threat of cyberattacks has been present since the propagation of the internet, but has only become a major corporate and national security threat in recent years.¹²⁹ One of the most common types of malware used to initiate cyberattacks is ransomware.¹³⁰ Ransomware is defined by the FBI as “a type of malware installed on a computer or server that encrypts the files, making them inaccessible until a specified ransom is paid.”¹³¹ The Department of Justice estimated in 2017 that “more than 4,000 ransomware attacks have occurred daily since January 1, 2016 [which] is a 300% increase over the approximately 1,000 attacks per day seen in 2015.”¹³²

One of the most notorious ransomware incursions prior to NotPetya was the WannaCry attacks in May 2017.¹³³ A group of hackers used a stolen NSA tool known as “ETERNALBLUE”¹³⁴ to hack into Windows computers and render them unusable unless the user paid a bitcoin ransom.¹³⁵ Microsoft issued a patch¹³⁶ for this vulnerability, but many

128. See, e.g., Statement from the Press Secretary, *supra* note 5 (calling Russian cyberattack “the most destructive and costly cyberattack in history”).

129. Rosenstein, *supra* note 26.

130. Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503, 504 (2019).

131. Public Service Announcement, Fed. Bureau of Investigation, Alert No. I-091516-PSA: Ransomware Victims Urged to Report Infections to Federal Law Enforcement 1 (Sept. 15, 2016), <https://www.ic3.gov/media/2016/160915.aspx> [<https://perma.cc/FP4D-6LW5>].

132. Rosenstein, *supra* note 26.

133. Trautman & Ormerod, *supra* note 130, at 524–25.

134. “ETERNALBLUE” is a zero-day exploit, a software vulnerability for Microsoft Windows for which no patch or fix had been publicly released when it was initially stolen. See *id.* at 524.

135. *Id.*; *Massive Ransomware Infection Hits Computers in 99 Countries*, BBC (May 13, 2017), <https://www.bbc.com/news/technology-39901382> [<https://perma.cc/2JMF-97DD>].

136. A patch is a software update usually comprised of code that is inserted or “patched” into an existing program. It typically fixes a problem until the next version of the software is released. See *Patch*, TECHOPEDIA (Feb. 15, 2017), <https://www.techopedia.com/definition/24537/patch>

older versions of Windows did not automatically install the patch.¹³⁷ Attacks such as WannaCry render computing hardware useless unless a ransom is paid.¹³⁸ Companies that suffer such hardware, data, and time losses might turn to their insurers for recovery.¹³⁹ As a result of the attack, more than 200,000 computers were infected in over 150 countries.¹⁴⁰ The attack is estimated to have cost between \$4 billion and \$8 billion in damage worldwide.¹⁴¹ The United States attributed the attack to North Korea.¹⁴² Although the Trump administration imposed sanctions on North Korea, it did not call the attack an act of war.¹⁴³

B. The NotPetya Cyberattacks and the Response in the United States

One month after the WannaCry attacks, the NotPetya cyberattacks struck across the globe.¹⁴⁴ Like WannaCry, NotPetya was implemented through the stolen “ETERNALBLUE” NSA program.¹⁴⁵ However, NotPetya was significantly more damaging than WannaCry.¹⁴⁶ NotPetya was not technically ransomware because it irreversibly rendered affected hardware inoperable.¹⁴⁷ Even if victims paid the bitcoin ransom, the files on the computers could not be recovered.¹⁴⁸ Additionally, NotPetya could affect computers with the Microsoft patch that had protected many

[<https://perma.cc/BJ78-N9DL>].

137. See Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, WIRED (Aug. 22, 2018), <https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/> [<https://perma.cc/52ZU-DJK3>] (noting that Maersk’s “less-than-perfect software patching [and] outdated operating systems” made the company vulnerable against NotPetya).

138. Trautman & Ormerod, *supra* note 130, at 507.

139. Companies affected by the WannaCry attacks included the British National Health Service, Spanish telecom giant Telefonica, French car maker Renault, and United States shipping company FedEx. See *Massive Ransomware Infection Hits Computers in 99 Countries*, *supra* note 135.

140. Russell Goldman, *What We Know and Don’t Know About the International Cyberattack*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/world/europe/international-cyber-attack-ransomware.html> [<https://perma.cc/TVW4-HSQ7>].

141. Greenberg, *supra* note 137.

142. Press Briefing, The White House, Press Briefing on the Attribution of the WannaCry Malware Attack to North Korea (Dec. 19, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-on-the-attribution-of-the-wannacry-malware-attack-to-north-korea-121917/> [<https://perma.cc/HHD5-CZC2>].

143. *Id.*

144. Satariano & Perloth, *supra* note 1.

145. Trautman & Ormerod, *supra* note 130, at 532.

146. *Id.*

147. *Id.*

148. *Id.*

machines from the WannaCry attacks in the previous month.¹⁴⁹ Experts estimated that NotPetya caused over \$10 billion in damage,¹⁵⁰ hitting companies across the world, from Ukraine to the United States to Tasmania to Denmark.¹⁵¹

The NotPetya cyberattacks have come to the forefront of insurance litigation as the world shifts from traditional land-warfare to cyberwarfare.¹⁵² Mondelēz International, the company that owns food brands such as Cadbury chocolates and Ritz crackers, suffered an estimated \$100 million in damages after the cyberattacks left their business operations floundering for weeks.¹⁵³ Merck pharmaceuticals lost millions from the same attack.¹⁵⁴ Both companies have sued their property insurers after their claims were denied under the war exclusion.¹⁵⁵ These pending cases have broad implications on how the commercial insurance industry will operate moving forward, as “government officials, who have increasingly taken a bolder approach to naming-and-shaming state sponsors of cyberattacks, . . . now risk becoming enmeshed in corporate disputes by giving insurance companies a rationale to deny claims.”¹⁵⁶

Mondelēz’s case against Zurich focuses on the war exclusion in Mondelēz’s all risk property insurance policy.¹⁵⁷ The policy is generally supposed to cover physical losses caused by cyber events:

The Policy provides annual coverage incepting November 1, 2016, for “all risks of physical loss or damage” to MDLZ’s property, specifically including “physical loss or damage to electronic data, programs, or software, including physical loss or damage caused by the malicious introduction of a machine code or instruction”

. . . “TIME ELEMENT” coverage, including for “Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the period of interruption directly resulting from the failure of the Insured’s electronic data processing equipment or media to

149. *Id.* at 534.

150. Greenberg, *supra* note 137.

151. *Id.*

152. Trautman & Ormerod, *supra* note 130, at 535 (“NotPetya represents a startling escalation of nation-state cyberwar.”); Greenberg, *supra* note 137 (“The release of NotPetya was an act of cyberwar by almost any definition”).

153. Satariano & Perlroth, *supra* note 1.

154. *Id.*

155. *Id.*

156. *Id.*

157. Complaint at 4, *Mondelēz Int’l, Inc. v. Zurich Am. Ins. Co.*, No. 2018-L-011008 (Ill. Cir. Ct. Oct. 10, 2018), 2018 WL 4941760.

operate” resulting from malicious cyber damage.¹⁵⁸

However, the policy excludes loss or damage resulting from “hostile or warlike action in time of peace or war” conducted by any “(i) government or sovereign power (de jure or de facto); (ii) military, naval, or air force; or (iii) agent or authority of any party specified in i or ii above.”¹⁵⁹

Before Mondelēz filed its complaint against its insurer, the United States government publicly blamed the Russian military for the NotPetya cyberattacks.¹⁶⁰ The Press Secretary released a statement, boldly claiming that “the Russian military launched the most destructive and costly cyber-attack in history . . . [It] caus[ed] billions of dollars in damage across Europe, Asia, and the Americas.”¹⁶¹ The United States did not just blame the NotPetya attacks in the media. Authorized by the Countering America’s Adversaries Through Sanctions Act (CAATSA),¹⁶² the President ordered the United States Treasury to impose economic sanctions on Russia as punishment for launching NotPetya.¹⁶³ With the government publicly blaming a sovereign nation for cyberattacks against the country, insurers are poised to successfully invoke the war exclusion to avoid liability for these attacks.

IV. TERRORISM AND CYBER INSURANCE ARE TOO NARROW TO COVER LOSSES ARISING FROM STATE-SPONSORED CYBERATTACKS

Terrorism and cyberattacks are modern risks that now have specific insurance policies available for insureds. These new policies are highly specialized and come with various exclusions, leading many commercial insureds to attempt to secure coverage under their commercial all risk policies. With the rise of state-sponsored terrorism, insurers began

158. *Id.* at 2.

159. *Id.* at 4. Pharmaceutical company Merck was another victim of the NotPetya attacks and filed a complaint against its insurers in New Jersey state court. *See* Complaint, Merck & Co., Inc. v. Ace Am. Ins. Co., No. UNN-L-002682-18 (N.J. Super. Ct. Law Div. Aug. 2, 2018). Merck is seeking coverage for physical loss or damage “of any computer data, coding, program, or software” as well as business interruption. *Id.* at 8–9. Merck’s insurers allegedly have also sought to avoid coverage under the war exclusion. *Id.* at 11.

160. *See* Statement from the Press Secretary, *supra* note 5.

161. *Id.*

162. Countering America’s Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017). While this law was passed just after the NotPetya attacks, it also provides provisions to enact sanctions against countries such as Iran and North Korea. *Id.* at 888–98, 940–55.

163. Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks (Mar. 15, 2018), <https://home.treasury.gov/news/press-releases/sm0312> [<https://perma.cc/BN7Z-BXTY>].

offering terrorism insurance coverage and writing exclusions specific to terrorism.¹⁶⁴ The traditional war exclusion could not apply because terrorists do not officially act on the authority of a sovereign nation.¹⁶⁵ Part IV discusses the war exclusion as applied to terrorism insurance policies following the 9/11 attacks and the development of cyber insurance policies. Although the NotPetya attacks can be viewed as acts of cyberterrorism, an exploration of both terrorism and cyber insurance policies shows that these tools are not suited for recovering physical and time losses incurred from cyberattacks.

A. Terrorism Insurance does not Cover State-Sponsored Acts—9/11 Serves as a Rare Exception

Until the 9/11 attacks occurred, courts consistently and confidently refused to apply the war exclusion to acts committed by terrorist groups.¹⁶⁶ Courts were comfortable determining that terrorist groups

[did] not appear to have acquired de facto government status through their affiliation with government entities like the Taliban or the former regime in Iraq. Therefore, any loss resulting from terrorist acts by terrorist groups would not appear to be proximately caused by any “war” waged by or between recognized states

as traditionally recognized in insurance law.¹⁶⁷

American insurance jurisprudence loosened after the 9/11 attacks, although courts have been careful to draw narrow holdings.¹⁶⁸ In light of the attacks, Congress passed the Terrorism Risk Insurance Act of 2002,¹⁶⁹ which generally required insurers to offer terrorism insurance to commercial clients on the same terms as other types of insurance.¹⁷⁰ These insurance policies covered losses caused by terrorism but not acts of war.¹⁷¹

In subsequent 9/11 litigation, the owner of a building near the World

164. See PLITT ET AL., *supra* note 11, § 152:18.

165. *Id.*; see also 18 U.S.C. § 2332b(g)(5) (stating that a terrorist is a criminal and not viewed as a soldier under federal law).

166. See *supra* Part I.

167. PLITT ET AL., *supra* note 11, § 152:21.

168. See *In re Sept. 11 Litig.*, 931 F. Supp. 2d 496 (S.D.N.Y. 2013), *aff’d*, 751 F.3d 86 (2d Cir. 2014).

169. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2322 (2002).

170. *Id.* at 2327–28.

171. *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 507.

Trade Center sued the Port Authority of New York and New Jersey as the owner of the World Trade Center, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹⁷² for recovery of clean up expenses.¹⁷³ The insurers for the Port Authority claimed that the attack fell under the terrorism policy's war exclusion and denied payment.¹⁷⁴ The court concluded that the "events of [9/11] were unique, and Congress, the President, and the American public treated 9/11 as unique" compared to prior terrorist attacks.¹⁷⁵ The court allowed the insurers to apply the war exclusion and deny payment.¹⁷⁶ To bolster its decision, the court relied on the fact that an "act of terror and devastation that provokes the response of war" can later be characterized as an act of war.¹⁷⁷ However, the court emphasized that its holding "as to the act-of-war defense should be read narrowly, fitting the facts of this case only. It should not be a precedent for cognate laws of insurance."¹⁷⁸ With the rise of "state-sponsored terrorism," it is becoming more difficult to separate acts of war from acts of terrorism for the purpose of interpreting insurance exclusions.¹⁷⁹ War losses tend to be catastrophic in scale and caused by sovereign military resources, which is why insurers try to exclude them.¹⁸⁰ Terrorism insurance, on the other hand, is designed to cover unpredictable losses that are more akin to criminal, not military acts.¹⁸¹ Courts should continue to interpret terrorism insurance coverage narrowly and avoid making another exception like they did for 9/11.

B. Cyber Insurance Is Inadequate to Cover Physical Losses from Cyber Events

Cyber insurance policies are similar to terrorism insurance in that both are narrow in application and are not sufficient on their own to provide complete coverage for insureds in the event of a catastrophic loss.¹⁸² The

172. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601.

173. *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 498.

174. *See id.* at 498–99.

175. *Id.* at 508.

176. *Id.* at 514.

177. *Id.* at 511.

178. *Id.* at 514.

179. *Terrorism*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "state-sponsored terrorism" as international terrorism sponsored by a sovereign government).

180. PLITT ET AL., *supra* note 11, § 152:1.

181. *Id.* § 152:21.

182. *See* Hunt, *supra* note 30, at 448.

first cyber insurance policies were issued in the late 1990s, when computers became more commonly used in commercial settings.¹⁸³ However, “most cyber policies will not cover physical damage to property or equipment resulting from a cyber event.”¹⁸⁴ Usually, the only first party coverage available under cyber insurance policies are for “costs associated with lost electronic data and software restoration.”¹⁸⁵ Cyber insurance policies, as they are written now, “are not intended to cover the frequent and manageable business risks that may result in economic loss, such as those associated with ordinary business operations.”¹⁸⁶ The language of typical cyber insurance policies could preclude coverage for cyber events caused by foreign nations, or at the very least preclude coverage for the economic losses traditionally covered by *time-element* provisions.¹⁸⁷ Instead, businesses continue to rely on traditional property insurance, rather than cyber insurance, to cover physical losses caused by cyber events.

V. INSURERS SHOULD NOT BE ABLE TO ESCAPE LIABILITY
BY ASSERTING THE WAR EXCLUSION AND AVOID
LITIGATION THROUGH THE POLITICAL QUESTION
DOCTRINE

The circuit split created by the *Universal Cable* Court’s application of the political question doctrine should not deter courts from litigating war exclusion cases. A closer examination of the case law relied upon in *Universal Cable* reveals that war in the insurance context firmly remains a judicial, not a political, question. For this reason, the courts handling NotPetya war exclusion claims should not allow insurers to escape liability for the losses caused by the cyberattacks. Part V first analyzes *Universal Cable*’s reliance on *Oetjen* and distinguishes interpreting treaties from insurance contracts. The second section of Part V applies the traditional war exclusion analysis established in *Pan Am* and concludes that insurers should remain liable for physical and time losses insured by all risk property insurance policies.

183. *Id.* at 404.

184. *Id.* at 410.

185. *Id.* at 411.

186. Margaret A. Reetz et al., *Cyber Risks: Evolving Threats, Emerging Coverages, and Ensuing Case Law*, 122 PA. ST. L. REV. 727, 736 (2018).

187. When a business’s operations are interrupted by a covered peril, “time loss” or “time-element” coverage would apply to repay the insured’s economic losses from the resultant inactivity. See Hunt, *supra* note 30, at 412.

A. Universal Cable's *Invocation of the Political Question Doctrine Is Misplaced*

Although there is a split between the Second and Ninth Circuits on whether the determination of sovereignty is a political question, the interpretation of an insurance contract is not a matter of international law and should remain a judicial issue.¹⁸⁸ The Second Circuit in *Pan Am* and the Southern District of New York in *Holiday Inns* draw a stark division from the media and governments' political recognition of sovereigns and the narrow definition of sovereign followed by the insurance industry.¹⁸⁹ Those courts were of the firm belief that insurance policies must be examined in "their insurance meaning" and that it was the role of the courts, not the media or the government, to make that determination.¹⁹⁰ More recently, however, the Ninth Circuit has leaned on the holding of *Oetjen*, and concluded that "[w]ho is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges."¹⁹¹ The *Universal Cable* Court concluded that determining the existence of war is a political question and only made its decision based on the actions of the government.¹⁹²

Going forward, courts should retain the power to determine if an entity is a sovereign for the purposes of insurance policy interpretation. While the Ninth Circuit's argument in *Universal Cable* may seem reasonable, it took the main source of law it relied upon out of context.¹⁹³ The Court in *Oetjen* was primarily concerned with the interpretation of the Hague Convention and the validity of a purchase of real property from a Mexican general.¹⁹⁴ Generally, the President, either through himself or the State Department, negotiates treaties and the Senate must give advice and consent before the United States may ratify the agreement.¹⁹⁵ In this context, the Court logically would defer the determination of sovereignty to the legislative and executive branches, as they were responsible for the

188. See *supra* Part II.

189. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1464 (S.D.N.Y. 1983) (noting that "[i]n commercial litigation arising out of insurance policies, words and phrases are construed 'for insurance purposes'—a context quite different from those of politics or journalism").

190. *Id.* at 1503.

191. *Universal Cable Prods., LLC v. Atl. Specialty Ins. Co.*, 929 F.3d 1143, 1158–59 (9th Cir. 2019) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)).

192. *Id.*

193. *Id.*

194. *Oetjen*, 246 U.S. at 299.

195. U.S. CONST. art. II, § 2, cl. 2.

ratification of the treaty.

However, the same issues of foreign policy are not present in the negotiation or interpretation of an insurance contract. While courts may have to grapple with politically charged facts arising from an insurance policy, the legal issues are not political—the decisions do not have the same effect as international law. The parties of an insurance contract are usually private entities, not nations. The interpretation of insurance contracts is more akin to the interpretation of statutes, which have always been within the judicial branch's authority.¹⁹⁶ Just as the court retained the common law property claims in *Alperin*, the insurance claims are similar to common law insurance interpretation and should not be barred by the political question doctrine.¹⁹⁷ While war is a political topic, its existence does not fall under the purview of the political question doctrine: "the existence of 'war' depends on the legal context in which it arises, and that context and meaning are generally susceptible to judicial identification."¹⁹⁸ Therefore, the judicial determinations of sovereignty carried out in *Pan Am* and *Holiday Inns* are appropriate.

B. In the Context of the NotPetya Attacks, Insurers Should not be able to Escape Liability Through the War or Warlike Actions Exclusion

Assuming that the courts retain the right to determine who is and is not a sovereign within the meaning of an insurance policy, the NotPetya attacks should remain covered despite the presence of a war or warlike actions exclusion. Pursuant to *Pan Am*, war must be conducted between two sovereign powers.¹⁹⁹ To be considered a warlike operation, the hostilities must be conducted in a theater of war and caused by a warlike agency.²⁰⁰ The NotPetya hackers are not sovereigns under the insurance definition of the term. The media and many governments around the world believe that the Russian military sponsored the attacks, but Russia has not publicly accepted responsibility.²⁰¹ Even if the hackers were sovereigns within the insurance meaning, the attacks were not conducted against

196. See generally Pearlstein, *supra* note 98 (arguing that the courts are not barred by the political question doctrine to determine the existence of war for the purpose of statutory interpretation). See *supra* section I.D.

197. *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005).

198. Pearlstein, *supra* note 98, at 167.

199. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1012 (2d Cir. 1974).

200. *Henry & MacGregor (Ltd.) v. Marten* [1918] 34 TLR 504, 505 (KB); *Pan Am. World Airways, Inc.*, 505 F.2d at 1017.

201. Greenberg, *supra* note 141.

another sovereign, but instead targeted companies across the world.²⁰² Therefore, the parties to the attacks would still fail to meet the definition of war within the meaning of the insurance policies at issue.

In addition to Mondelēz International, Danish shipping conglomerate Maersk, American pharmaceutical company Merck, and Ukrainian software company Linkos Group were also victims of the cyberattack.²⁰³ The insurers could try to argue that the companies were victims of warlike operations, but it would be a stretch to call every affected company a theater of war or a sufficient proxy for the sovereigns Russia allegedly attacked.²⁰⁴ Complicating the insurer's argument is the fact that Russia's state-owned oil company Rosneft was also a victim of the cyberattacks.²⁰⁵ The insurers would be hard-pressed to argue that Russia, through the NotPetya hackers, was attacking itself or was collateral in a warlike operation.

Cyberwarfare is much like terrorism in that it often has no regard for national borders. The law—rigid and slow to evolve—struggled to adopt legal remedies, especially for terrorism.²⁰⁶ Following this trend, the courts determining the coverage claims for Mondelēz and others will likely refuse to recognize a new interpretation of the war exclusion to allow the insurers to avoid liability. Just as the *Pan Am* Court noted that Aetna was aware of the risk of political plane hijackings and failed to explicitly exclude such losses in its all risk policy,²⁰⁷ the NotPetya insurers should reasonably have been aware of the risk of cyberattacks in the wake of WannaCry and explicitly excluded such losses if they wished to avoid liability.²⁰⁸

Regardless of the decision reached in the *Mondelēz* and *Merck* suits, insurers will be sure to adapt their practices in the future. The party that will bear the burden of cyber losses may well be different in the coming years. In a traditional war between nations, it is the governments, rather than private insurers, that bear the burden of such losses.²⁰⁹ As the landscape of modern warfare changes, the government may shoulder the

202. Satariano & Perlroth, *supra* note 1.

203. *Id.*; Greenberg, *supra* note 141.

204. *See Pan Am. World Airways, Inc.*, 505 F.2d at 1012.

205. Satariano & Perlroth, *supra* note 1.

206. *See generally In re Sept. 11 Litig.*, 931 F. Supp. 2d 496 (S.D.N.Y. 2013), *aff'd*, 751 F.3d 86 (2d Cir. 2014).

207. *Pan Am. World Airways, Inc.*, 505 F.2d at 1000.

208. *See supra* section III.B.

209. *Pan Am. World Airways, Inc.*, 505 F.2d at 994 (noting at the time of the case that “American underwriters do not write war risk coverage. Thus, Pan American had to turn to the United States government for war risk coverage for the excess over the London market limit”).

burden for cyber losses as well. Until then, private insurers should more clearly exclude all types of losses proximately caused by cyberattacks to avoid liability. Large companies should also consider additional strategies to protect their business interests from cyberattacks. Soon, they may not be able to rely on insurers.

CONCLUSION

Commercial all risk property insurance policies are commonly held by companies to protect losses to the insured's property. These policies typically include a war exclusion, which specifically does not cover losses arising from war or warlike actions. In the insurance industry, war must be a conflict between two sovereign nations. While courts have not hesitated to apply the war exclusion in periods of declared war, the exclusion has become more ambiguous with the rise of terrorism and cyberattacks. The determination of sovereignty and subsequently the existence of war for purposes of the insurance policy can invoke separation of power concerns. While the Second Circuit has historically declined to apply the political question doctrine to its war exclusion analysis, the Ninth Circuit has recently brought the political question doctrine back to the forefront of its war exclusion jurisprudence.

Insurers should not be able to use the war exclusion for cyberterrorism events. Going forward, they should adapt the terms of their policy exclusions to better account for cyber-related losses across all types of insurance policies. With the current wording of war exclusion provisions, cyberattacks such as NotPetya would be considered closer to acts of terrorism than acts of war because the conflicts are not between sovereigns. Courts will not allow private insurers to shirk liability when precedent urges the narrow application of the war exclusion. Although the United States government and the media have been holding foreign nations responsible for the cyberattacks, the response so far has not been warlike when compared to the 9/11 attacks. Because the NotPetya attacks are not warlike in the insurance sense, it is the responsibility of insurers to specifically exclude physical and time losses related to cyberattacks in order to ensure that they do not bear such liability in the future. Governments provide insurance for losses caused by physical warfare—they should assume the risk for cyberwarfare as well. Modern warfare has evolved since the war exclusion was first enacted in the eighteenth century. The terms of the war exclusion must evolve too.